Supreme Court, U. S.
FILED
MAY 6 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-1767

WILMINGTON UNITED NEIGHBORHOODS, et al.

Petitioners,

vs.

U.S. DEPARTMENT OF HEALTH, ~~EDUCATION, AND WELFARE,~~ and Human Services, et al.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Wilmington United Neighborhoods (hereinafter "WUN") and individual persons, plaintiffs below, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit which was entered in this case on February 6, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, Volume I, pp 1a-33a) is not yet officially reported. The opinion of the District Court (Appendix B, Volume II, pp 34a-113a) is reported at 458 F.Supp. 628.

JURISDICTION

The judgment of a divided Court of Appeals for the Third Circuit was entered on February 6, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The questions presented in this petition are:

(1) Whether a statutory provision precluding judicial review of determinations by a federal official precludes review of allegations of corruption against that official.

(2) Whether there is judicial review of the actions of state agencies in interpreting and applying the standards and criteria set forth in a federal statute and its implementing regulations, where the federal statute does not expressly preclude such review.

STATUTES AND REGULATIONS INVOLVED

The statute and regulations involved in this case are section 1122 of the Social Security Act (42 U.S.C. § 1320a-1 et seq.) and its implementing regulation (42 C.F.R. §§ 100.101 - 100.109). The pertinent portions of the statute and regulation appear at Appendix C, Volume III, pp 114a - 132a).

STATEMENT

Under §1122 of the Social Security Act, a State may enter into an agreement with the U.S. Department of Health, Education, and Welfare (hereinafter "HEW") whereby proposed capital expenditures of health care facilities will be reviewed

for their consistency with standards, criteria, and plans developed pursuant to various federal health authorities and the §1122 implementing regulations (42 C.F.R. §100.107; App.127a). In a State participating in the program, health facilities may submit proposed capital expenditures to the §1122 review process. Approval under §1122 guarantees that HEW will not deduct as unnecessary expenditures those amounts attributable to depreciation, interest, and other expenses related to the capital expenditure from the federal reimbursement for patient care under the HEW administered Medicare, Medicaid, and Title V programs (42 U.S.C. §§ 1395, 1396, and 701). Denial of approval means that the facility will be denied such reimbursement unless the Secretary of HEW determines that there are compelling reasons to permit such reimbursement (42 U.S.C. §1320a-1(d); App. 119a-120a). Some 38 States have entered into such agreements with HEW.

In March 1976, the Wilmington Medical Center (hereinafter "WMC"), which is the primary provider of hospital services in New Castle County, Delaware, applied to the §1122 State agency (hereinafter "the DPA") for approval for a major shift of hospital services in the County. Specifically, WMC proposed to close two of its three hospital facilities within the City of Wilmington, reduce the inpatient service at the third facility to 240 beds, and construct a new 800 bed facility in a sparsely populated area of the County, some eight and one half miles from the City. After receiving the favorable but qualified recommendation of the local health planning agency,[1] the DPA approved the proposal under §1122.

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1 Section 1122 provides for the review and recommendation of local nonprofit planning agencies (42 U.S.C. §1320a-1(b)(2); App. 115a). In the instant case, the local agency commented favorably, providing the total construction cost did not deviate more than 5% from its projected cost.

Individual petitioner Thomas Carroll, on behalf of himself and organizational petitioner WUN, wrote to HEW, inquiring into the procedures available on that level to appeal the DPA decision. Carroll was informed in writing that, if a DPA has approved a project, HEW

> "...does not address the question of whether the proposed capital expenditure is in accordance with the plans, criteria, and standards. The question has, under the statute and regulations, been decided at the State level, and such decision is not reviewable in the Department...."

On August 6, 1976, HEW approved the relocation plan for §1122 purposes. On February 5, 1977, petitioners filed a timely request, with supporting documents, for reconsideration by HEW of its August 6, 1976 approval of the relocation plan. Included were allegations that the DPA had violated and/or ignored the standards set down in the federal regulations and the federally-approved health plans.

In the period between the initial HEW approval and the filing of the request for reconsideration, an action was filed in the U.S. District Court for the District of Delaware, challenging the relocation plan as violating Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d), §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), and the environmental impact statement requirements of the National Environmental Policy Act of 1968 (42 U.S.C. §4332(c)). (NAACP et al. vs. WMC et al., No. 76-298 D.Del.). HEW (a defendant in that action) took the position, inter alia, in a motion to dismiss, that it had not violated its statutory obligations because under the §1122 statutory scheme HEW has no authority to review approvals by State §1122 agencies on the merits for any reason. The District Court initially avoided the §1122 issue, ordering HEW to reconsider its position as it related to the NEPA cause and to investigate the civil rights causes for

other reasons (426 F.Supp. 919).[2]

In July 1977, HEW filed a report on the civil rights causes, finding that the relocation plan would violate Title VI and §504, but that certain changes (which would include changes necessitating capital expenditures) would bring WMC into compliance. Pursuant to the scheme of Title VI and §504, HEW entered into negotiations with WMC to seek voluntary compliance. During the course of the negotiations HEW wrote a letter to WMC,

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2 In May 1977, HEW filed a report on the NEPA cause, finding a significant impact on the environment but retaining its position on its lack of authority to review DPA approvals under §1122, and consequently asserting the inapplicability of the environmental impact statement requirements of NEPA as there was no "major federal action." Cross-motions for partial summary judgment on that cause led to the District Court's adoption of the HEW position (436 F.Supp. 1194). That action was affirmed by the Third Circuit (584 F.2d 619). The key to both decisions was the legal conclusion that HEW had no power to review a DPA approval under §1122 for any substantive reason.

in which it stated, inter alia, that it expected the modifications which were being negotiated to "be submitted to local and other planning agencies as addenda" to the relocation plan.

On September 7, 1977, some seven months after the Request for Reconsideration had been filed, HEW responded. While reiterating the position that HEW did not have the authority under §1122 to make an independent finding on the merits of the relocation plan, HEW interpreted its own regulations and concluded that

> "compliance with the July 5, 1977, findings of the Office for Civil Rights, Region III will alter the capital expenditures proposed sufficiently to require a new capital expenditure review under section 1122 of the Social Security Act."

On September 30, 1977, HEW Secretary Califano received a letter from Irving Shapiro, Chairman of the Board of the DuPont Company and an unofficial economic advisor and friend of President Carter, in which Shapiro forwarded and endorsed the request by WMC officials that Califano

"rectify the error of the [HEW] reconsideration." The Shapiro letter was stamped "PRIORITY" and notations were placed on it directing that copies be routed to several officials in the Office for Civil Rights of HEW and to its Philadelphia regional office and that the Office of General Counsel prepare a reply for the Secretary's signature by October 5, 1977.

Petitioners have never been permitted to engage in discovery to ascertain the internal actions precipitated by the Shapiro request. However, the external response by HEW was immediate and direct. First, on October 12, 1977, HEW issued a letter in which it modified its September 7, 1977 position. Describing its action as a "clarification," HEW reversed its September 7, 1977 decision that WMC's compliance with the civil rights findings would require a new §1122 review of the relocation plan. And, secondly, on November 1, 1977, WMC and HEW entered into an agreement on modifications of the relocation plan,

intended to bring that plan into compliance with Title VI and section 504. Those modifications which related to capital expenditures were the same as those earlier identified by HEW, i.e., commitments by WMC to provide a transportation system free-of-charge to patients, employees, and visitors and to renovate the facility left behind in the City, no matter what the cost of either commitment. However, the agreement did not provide that the plan would be submitted for approval to the State and local planning agencies as HEW earlier indicated would be required.[3]

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3 Following the HEW/WMC agreement, the District Court decided that the beneficiaries of Title VI and §504 did not possess private rights-of-action, but were limited to challenging the HEW/WMC agreement under the "arbitrary and capricious" standard for agency review under 5 U.S.C. §706(2)(A). Subsequently, the District Court held that the agreement was not arbitrary and capricious (453 F.Supp. 280) and that the plaintiffs were not denied due process by the denial of an evidentiary hearing before the agency (453 F. Supp. 330). In June 1979, the Third Circuit reversed the decision of the District Court on the private right-of-action issue and remanded the case for an evidentiary trial in District Court (559 F.2d 1247). A decision following trial on the civil rights issue is pending from the District Court.

On November 11, 1977, petitioners instituted this action in Federal court. Among the causes alleged were: (1) a challenge under §1122 to the DPA approval of the relocation plan on a basis that the DPA violated the federal regulations, standards and criteria, and federally-approved health plans in reaching its decision; (2) a challenge to the HEW reversal in October 1977 of its September 1977 decision on the basis that the reversal was reached not on the merits, but rather as the result of pressure on the Secretary from an outside advisor and friend of the President, which corrupted the decision-making process. Jurisdiction of the District Court on these causes was based on 28 U.S.C. §§ 1331 and 1361.

Following motions to dismiss, the District Court concluded, inter alia, that both these causes were precluded from review (App. 68a-70a, 73a-78a). With respect to the cause involving the improper influence of a personal friend and advisor to the President, the District

Court held that, even if true, that cause was precluded from review by the express language of §1122(f) which provides

> "A determination by the Secretary under this section shall not be subject to administrative or judicial review." (App. 120a)

With respect to the DPA, the District Court, acknowledging that there was no express preclusion of DPA determinations, found that Congress' preclusion of review of HEW determinations under §1122(f) evidenced an intent to avoid all Federal interference with substantive planning decisions of State agencies under §1122, judicial as well as executive (App. 77a-78a).

On appeal, the Third Circuit affirmed, with Judge Adams dissenting on the issue involving the implied preclusion of the cause against the DPA (App. 22a-33a). With respect to whether the express preclusion provision would reach a cause concerning improper influence in the decision-making process, the Third Circuit found it "manifestly unreviewable" under §1122(f). Despite the fact that the case was decided on a motion to

dismiss, the Court bolstered its position by distinguishing the improper influence cases upon which petitioners relied, finding that "the nature and degree of the pressures exerted in those cases were significantly different" (App. 13a-15a).

With respect to whether preclusion may be implied on the cause involving the DPA, the panel majority, just as the District Court, found congressional intent to preclude all federal interference, judicial as well as executive, in the express preclusion clause involving HEW and in language of a House Committee report referring to State autonomy (App. 15a - 18a). In response to petitioner's contentions concerning the needs of uniformity in the administration of a federal program, the majority simply rejected the "underlying premise that the program is a 'federal' one" (App. 17a-18a).

In dissent on the DPA issue, Judge Adams disagreed with the contention of the majority as to the federal nature of

the federally established and funded §1122 program (App. 26a-28a). He applied the standards set down by this court with respect to implying a preclusion of judicial review and found no clear and convincing evidence that Congress intended to foreclose review of decisions of State agencies, alleged to be violating federally established standards and guidelines in administering a program established under a federal statute (App. 33a).

REASONS FOR THE WRIT

Summary of Reasons

The Court below has decided that a cause of action involving improper influences upon the decision-making process is precluded from judicial review notwithstanding the limitations of the preclusion provision. The decision is in conflict with applicable decisions of this Court. When a provision of a federal statute precludes judicial review of decisions of the agency head under the statute, decisions which were reached as

a result of improper influences which corrupted the decision-making process were not made under that statute; therefore, the cause is not precluded from judicial review. Cf., Johnson v. Robinson, 415 U.S. 360 (1974); Weinberger v. Salfi, 422 U.S. 749 (1975).

Alternatively, the Court below has decided an important question of federal law which has not been, but should be, settled by this Court. In Morris v. Gressette, 432 U.S. 491, 507, fn. 24 (1977), the Court noted, but did not have to decide, the issue whether the improper relinquishment of responsibility by an agency head would be subject to judicial review notwithstanding a finding that Congress intended preclusion of judicial review. The instant case squarely raises the more extreme issue: does a decision reached, not by impartial consideration of statutory criteria, but as a result of external pressure, so corrupt the decision-making process that the charge must be subject to judicial review as a matter of public policy unless a preclusion

clause explicitly precludes review of such charges?

Secondly, a panel majority in the Court below has decided that judicial review of the actions of a State agency to which federal decision-making authority has been delegated is precluded, notwithstanding the absence of an express preclusion provision and the absence of any legislative history and statutory purpose supporting the implication of preclusion. This decision is in conflict with controlling principles of law established by this Court concerning the presumption of judicial review. See, Barlow v. Collins, 397 U.S. 159, 166-7 (1970); Abbott Laboratories v. Gardner, 387 U.S. 136 U.S. 136, 140-1 (1967); Dunlop v. Bachowski, 421 U.S. 560 (1975).

Further, the decision of the panel majority raises serious questions of federal supremacy and uniformity of administration of federal regulations and a federal program. The absence of judicial review of all State agency actions applying the §1122 regulations, when the federal executive lacks the authority to review deviations, means

there is no way to assure uniformity in the interpretation and administration of federal regulations across the country. The decision of the panel majority dismissing petitioner's uniformity argument by asserting that the program is not a federal program misreads the statute and regulations and conflicts with the conclusion of the U.S. District Court for the Northern District of Indiana, which decision was affirmed, without opinion by the Seventh Circuit. See, Lakeside Mercy Hospital v. Indiana State Board of Health, 421 F.Supp. 193, 201 (1976), aff'd 547 F.2d 1170 (1976). The questions for this Court on this issue thus are: (1) whether the Third Circuit has departed from the presumption of reviewability well-established by the decisions of this court; (2) whether the panel majority in the Third Circuit in this case or the Seventh Circuit in the Lakeside Mercy case is correct in asserting that the issues raise federal questions under a federal program; and/or (3) whether public policy dictates that the presumption of judicial review

applies in the absence of an explcit preclusion clause when there is no other way to assure uniformity in the interpretation and administration of a federal statute and regulations.

Reasons

1. Congress has not precluded all instances of judicial review under the §1122 program by the limitation set forth in §1122(f). Only actions which constitute determinations by the Secretary "under this section" are precluded from judicial review. This Court has given no broader interpretation to the language of a preclusion provision than it literally demands. In Johnson v. Robinson, 415 U.S. 360, 367 (1974), this Court held that a provision precluding review of decisions under a statute did not reach constitutional challenges as,

> [a] decision of law or fact "under" a statute is made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts. Appellee's constitutional challenge is not to any such decision of the Administrator, but rather to a decision of Congress...

This position was reaffirmed the following year by this Court when it drew a distinction between statutes which preclude judicial review entirely and those which are limited to a preclusion of review of an administrator's decision under the statute. Weinberger v. Salfi, 422 U.S. 749 (1975).

That distinction is relevant herein. A determination by the Secretary under §1122 is limited to those considerations which Congress intended to be included in his responsibilities. Under the HEW interpretation of those responsibilities, accepted by the District Court and the Third Circuit, when a DPA has approved a project, the Secretary's responsibilities are limited to a determination that the procedural timeframes have been followed. They do not even include a determination whether the DPA followed the standards set forth in the federal regulations in approving the project. Certainly, a determination by the Secretary under §1122 would not include as a consideration the influence of a

powerful advisor and friend of the President, as such would be a "consideration that Congress could not have intended to make relevant" D.C. Federation of Civil Associations v. Volpe, 459 F2d 1231, 1247 (D.C. Cir., 1972) .

As the D.C. Circuit in Volpe made clear, the fact that Congress had delegated authority to administer a statute to an agency does not make every decision of that agency valid. In context of invalidating an action of the Department of Transportation because of the intrusion into the decision-making authority of a powerful Congressman, the D.C. Circuit stated, "...the Secretary must reach his decision strictly on the merits and in the manner prescribed by statute, without reference to irrelevant or extraneous considerations" (459 F2d at 1248). Nothing is more outside the appropriate procedure,[4] or more irrelevant

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4 Under the §1122 regulations, decisions on reconsideration "will be based upon the record of the proceedings." 42 C.F.R. §100.108(d)(2). (See App. 131a-132a).

to an interpretation of the §1122 statute, than the influence of a powerful economic and political figure. A decision made in that way and on the basis of that influence is not one made "under the statute."

2. The principles set forth by the D.C. Circuit in Volpe appear sound, i.e., that a decision would be invalid if based in whole or in part on the pressures emanating from a powerful political figure external to the decision-making process. See also, Texas Medical Association v. Mathews, 408 F.Supp. 303 (W.D. Tex., 1976). The attempt by the Third Circuit to distinguish those cases from the instant case on the facts is irrelevant at this stage of the proceedings, as petitioners have never been accorded an opportunity to establish the facts. For example, what if the evidentiary record would establish that the decision-maker was told that he would be fired unless he reversed his earlier decision that the §1122 regulations required a new review? What if it could be established that the reversal was ordered because the President wanted to satisfy the wishes of his friend

and unofficial economic advisor? There is certainly something of a highly unusual nature when a decision, reached after seven months of deliberation, is precipitiously reversed after the intrusion of powerful influences outside the statutorily authorized decision-making process. Petitioners are entitled to develop their record before the courts distinguish precedent on the facts.

The quesiton thus is, whether a preclusion of review provision, which does not explicitly preclude review of improper influence or corruption causes, nevertheless precludes those causes. While the issue was raised in a footnote discussion in Morris v. Gressette, 432 U.S. 491, 507, fn. 24 (1977), the focal point of that discussion was a response to a "parade of horribles" suggested in the dissenting opinion. There were no improper or corrupt influences in fact in Morris, just an incorrect decision of the Attorney General. Totally apart from whether a determination of the Secretary as a result of corrupt

influences is one "under the statute," this Court should decide whether, as a matter of public policy, any preclusion of review clause which does not explicitly reach corruption charges should nevertheless be interpreted to prevent judicial review of such charges.

3. As often stated by this Court, judicial review of a final agency action by an aggrieved person is the rule and nonreviewability an exception which must be demonstrated by "clear and convincing" evidence that Congress intended preclusion. See, e.g., Barlow v. Collins, 397 U.S. 159, 166-7 (1970); Abbott Laboratories v. Gardner, 387 U.S. 136, 140-1 (1967); Dunlop v. Bachowski, 421 U.S. 560 (1975). In the case of a review of determinations by the DPA, there is not only no express preclusion of review, there is no clear and convincing evidence from which preclusion can be inferred.

The legislative history is devoid of any intention to preclude review of actions of the DPA. The sole legislative

reference by the panel majority to support a finding of legislative purpose is to language in the House Report that "the bill would in no way change the autonomy or authority of existing State or local planning agencies" (App. 15a-16a). That opinion, however, ignores the fact that disapprovals by State agencies can be reversed by HEW (see, 42 C.F.R. §100.108(a); App. 128a-129a) and that reversals of denials would no less interfere with the "autonomy or authority" of the State agency than reversals of approvals. It would appear, as suggested by Judge Adams, that the autonomy language "simply means that the federal government was not attempting to preempt the field of health planning or to abolish existing State efforts" (App. 28a). Indeed, §1122 is not a mandatory program; it is only if States wish to receive federal reimbursement for their planning programs that they must comply with the federal statutory and regulatory requirements.

The panel majority also attempts to find legislative purpose in agency regulations which it describes as indicative of congressional intent that there be a streamlined procedure (App. 17a). Suffice it to say, these are, at best, regulations of the agency, not the Congress. The Congressional purpose explicitly provides that its purposes are to encourage health planning and to insure that unnecessary expenditures under federal health programs do not occur (see, 42 U.S.C. §1320a-1(a); App. 114a). There is no statement concerning streamlined guarantees of reimbursement to providers stated in the statute.

The panel majority further suggests that it would be incongruous to provide federal judicial review of DPA decisions, while precluding federal judicial review of the decisions of the federal administrator. What that suggestion ignores is that the decisions of each level are different and independent of one another, a position otherwise recognized by that

Court in both this case and in the earlier one concerning the interface of §1122 with NEPA (NAACP et al. v. WMC et al., 584 F2d 619. Further, one must presume Congress knew what it was doing; it precluded review of the HEW determinations clearly and simply, but did not preclude the review of the DPA separate and independent decisions. To find a preclusion of DPA decisions is to rewrite legislation. The courts below thus departed from the fundamental principle that it is Congress, not the courts, which write legislation.

4. Moreover, there is a fundamental policy difference which the panel majority rejects. It would leave to State agencies the interpretation and application of federal regulations, with the possibility that there could be 50 different interpretations and applications.[5] The federal

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5 This possibility is not just theoretical. The Pennsylvania DPA and Delaware DPA interpret the meaning of the §1122 regulation dealing with "the obligation of the capital expenditure" differently, i.e.,

(continued next page)

agency has taken the position, as reflected in its regulations, that when a DPA approves a project, HEW has no authority to make a substantive review (42 C.F.R. §100.108(a); see App. 128a-129a), a position endorsed by the Third Circuit. In that context, there is no uniformity in the interpretation and administration of a federal law and program across the country.

The panel majority dismisses that argument, by asserting that the program is not a federal program. In doing so, it ignores the fact that it is a federal statute, federal operation monies, and totally pervasive federal standards which have been put into issue by the allegations of the complaint raised in this petition. That conclusion of the panel majority also differs from one of the Seventh Circuit, which affirmed without

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(footnote continued from previous page)

in Pennsylvania, the construction management contract which WMC signed would have been declared insufficient and the §1122 approval would have terminated (see Joint Appendix to the Third Circuit, pp 420-430).

opinion the decision of the U.S. District Court for the Northern District of Indiana that allegations concerning the non-compliance of a §1122 agency present a federal question, as the "controversy involves the construction of a federal statute and the regulations issued thereunder." See Lakeside Mercy Hospital v. Indiana State Board of Health, 421 F.Supp. 193, 201 (1976), aff'd 547 F.2d 1170 (1976).[6]

As State laws, regulations, and policies which violate the federal statute under which the program operates are invalid under the Supremacy clause (see Townsend v. Swank, 404 U.S. 282, 286 (1971)), the absence of any federal review, either executive or judicial, raises policy concerns of administration.

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6 As noted in Lakeside, the State courts in Indiana held that §1122 is a federal program not subject to State review. A similar position has recently been taken in Pennsylvania. See Sarah A. Todd Memorial Home v. Comm. of Pa. Dept. of Health, — Pa. Cmwlth. —, 410 A2d 404 (1980).

In the absence of an explicit preclusion clause, no such preclusion which would permit multiple and varied interpretations of a federal program should be inferred.

CONCLUSION

For the foregoing reasons a Writ of Certiorari should be granted.

Respectfully submitted,

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